

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Skky, Inc.,	)	File No. CV-13-2072
	)	(PJS/JJG)
Plaintiff,)	
)	
vs.	)	St. Paul, Minnesota
	)	March 5, 2014
Thumbplay Ringtones, LLC,)	
	)	DIGITAL RECORDING
Defendant.)	
)	

Skky, Inc.,	)	File No. CV-13-2083
	)	(PJS/JJG)
Plaintiff,)	
)	
vs.	)	St. Paul, Minnesota
	)	March 5, 2014
Dada Entertainment, Inc.,)	
	)	DIGITAL RECORDING
Defendant.)	
)	

Skky, Inc.,	)	File No. CV-13-2086
	)	(PJS/JJG)
Plaintiff,)	
)	
vs.	)	St. Paul, Minnesota
	)	March 5, 2014
Manwin USA, Inc. and Manwin)	
Holding, s.ar.l,	)	DIGITAL RECORDING
)	
Defendants.)	
)	

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)
Skky, Inc.,) File No. CV-13-2087
) (PJS/JJG)
Plaintiff,)
)
vs.) St. Paul, Minnesota
) March 5, 2014
Vivid Entertainment, LLC,)
) **DIGITAL RECORDING**
Defendant.)
)

)
Skky, Inc.,) File No. CV-13-2089
) (PJS/JJG)
Plaintiff,)
)
vs.) St. Paul, Minnesota
) March 5, 2014
Playboy Enterprises, Inc.,)
) **DIGITAL RECORDING**
Defendant.)
)

BEFORE THE HONORABLE JEANNE J. GRAHAM
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTIONS HEARING)

Proceedings recorded by digital recording; transcript
produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: We are here today in the matter of Skky vs. Thumbplay Ringtones and several other defendants, Civil File No. -- excuse me one moment, please -- 13-2072. This is assigned to Patrick Schiltz as the district court judge. And I am Jeanne Graham. I'm the magistrate judge. We are here today on defendants' motion for disqualification of one of the plaintiff's attorney's firms.

May I have appearances, please, first for the plaintiff's side.

MS. THORSON: Good afternoon, Your Honor. Becky Thorson with Robins, Kaplan, Miller & Ciresi here on behalf of Skky, Inc. With me here today is my colleague Ryan Schultz from Robins, Kaplan, Miller & Ciresi and co-counsel Daniel Rosen from the Parker Rosen law firm. We also have with us here today Andrew Parker --

THE COURT: All right. Thank you.

MS. THORSON: -- from the Parker Rosen law firm.

THE COURT: All right.

MS. THORSON: Thank you.

THE COURT: And who is here for --

MR. NOSHER: Good afternoon, Your Honor. Todd Noshier from Venable on behalf of Manwin, Vivid, and Playboy. And I will let my co-counsel introduce themselves.

1 MS. MILLER: Justi Miller from Berens & Miller.

2 MR. BUDD: Ted Budd from Faegre Baker Daniels.

3 MR. HEVERIN: And Tim Heverin from Jones Day on
4 behalf of Dada and the Thumbplay defendants.

5 THE COURT: Okay. All right. I'm going to -- I
6 don't know how long your presentations were going to be. I
7 usually plan about 20 minutes each on a nondispositive
8 motion. Were you going longer?

9 UNIDENTIFIED SPEAKER: No, Your Honor. We will
10 actually be much shorter than that.

11 THE COURT: Okay. Well, good. Then kind of the
12 way we'll do it is we will allow the defense to go first.
13 When you go ahead and come up to the microphone, make sure
14 you remind us all who is arguing.

15 UNIDENTIFIED SPEAKER: Sure.

16 THE COURT: And then -- not for me so much as the
17 record. And then I'll certainly allow plaintiffs a
18 response. Who is going to argue on behalf of plaintiffs?

19 MS. THORSON: I will, Your Honor.

20 THE COURT: Okay, Ms. Thorson. And then I'll
21 allow a brief reply on behalf of the defense. I won't keep,
22 you know, real -- I won't do the minute by minute, then, if
23 it looks like all parties can probably get it done in about
24 that time.

25 All right. Go ahead.

1 MR. NOSHER: Thank you, Your Honor.

2 THE COURT: From the defense first.

3 MR. NOSHER: Like I said, we prepared a handful of
4 slides to hopefully clarify the issues for the Court. I'll
5 be handling the slides --

6 THE COURT: Do we have copies of those slides?

7 MS. MILLER: Your Honor, can I approach?

8 THE COURT: There we go. And the other side, do
9 you have, Ms. Thorson --

10 MS. THORSON: I have [inaudible].

11 THE COURT: Oh, you have them in your hands.
12 Okay. Delivery being made.

13 MS. THORSON: Thank you.

14 THE COURT: All right.

15 MR. NOSHER: Thank you, Your Honor. This motion
16 is about the risk to defendants' confidential information as
17 a result of the relationship between Skky, Inc. and the
18 Parker Rosen law firm. The relationship is complex and
19 still layered with many questions.

20 There are four material facts that are relevant to
21 this hearing and these are relevant facts that, frankly,
22 were only recently disclosed and discovered partially
23 because of defendants' research into the issues.

24 The first material fact is that Andrew Parker, one
25 of two named partners of the Parker Rosen law firm and

1 litigation counsel to Skky in these actions, from July 31st
2 of 2013 to very recently, January 23rd of 2014, is Skky's
3 chief operating officer who handles the day-to-day
4 operations of that company.

5 Mr. Parker receives at least two forms of
6 compensation from Skky for his role as COO. He receives
7 stock and an undisclosed monthly stipend that is paid to his
8 firm.

9 The third relevant fact is that Mr. Parker and his
10 partner, Mr. Rosen, control an unnamed company that owns
11 stock in Skky.

12 And finally, the fourth material fact is that Skky
13 moved its corporate headquarters into the Parker Rosen law
14 firm on an undisclosed date in November of 2013.

15 Now, a nonpracticing entity occupying outside
16 counsel's office is very concerning to defendants and it
17 appears to be unprecedented. This information, again, came
18 to light as a result of defendants' own research.

19 Thankfully we discovered material fact number one,
20 which, again, is the fact that Andrew Parker is COO of Skky,
21 by virtue of defendants' own research, but it is unclear
22 whether defendants still have all the relevant facts. New
23 admissions in Skky's opposition raise additional questions
24 and concerns.

25 Here the risk of defendants' confidentiality

1 outweighs the harm to Skky if the motion is granted. To be
2 clear, Skky is represented by two firms, Robins Kaplan and
3 Parker Rosen. And Robins Kaplan is admittedly the lead
4 counsel in this case, they handle all the day-to-day
5 operations of the case, and therefore we believe a
6 disqualification of the Parker Rosen firm will have little
7 to no impact on Skky.

8 So if we can take a look at the slides that we've
9 prepared. Let's take a closer look at the relationship
10 between Parker Rosen and Skky.

11 Again, Andrew Parker and Daniel Rosen are the
12 named partners at the Parker Rosen law firm. This firm has
13 one location, Suite 888, Colwell Building at 123 North Third
14 Street in Minneapolis. The firm has three other attorneys
15 and some support staff.

16 Now, Mr. Parker, again, he's the COO of Skky. He
17 receives multiple forms of compensation for his role as COO.
18 As you see on the top left, his firm receives an unknown
19 monthly stipend. We don't know the amount. We don't know
20 anything else other than it's a monthly stipend. He
21 receives stock and his firm receives rental payments by
22 virtue of the fact that Skky is operating now out of the
23 Parker Rosen firm.

24 Now, like Mr. Parker, Mr. Rosen controls an
25 unknown company that owns stock in Skky. Skky is silent on

1 the specifics here. We don't know the name of this
2 corporation. We don't know the company address. We don't
3 know the relationship between this unnamed corporation and
4 Skky and Parker Rosen. We don't know the titles or the
5 roles of Mr. Parker or Mr. Rosen or if -- some of the other
6 employees that may be involved with this unnamed
7 corporation. And, frankly, we don't know if there is common
8 usage between the computer network systems between this
9 corporation and the Parker Rosen firm and Skky, Inc.

10 Now, as is typical of a nonpracticing entity,
11 Skky and its predecessor, 4 Media, Inc., have shuffled
12 corporate addresses since their inception in what we
13 believe is 2001.

14 Here, only weeks after certifying a different
15 address in their amended complaint, Skky moved its corporate
16 headquarters into the Parker Rosen firm. Skky still
17 provides no specific date for this move. All we know is
18 that it happened at some point in November of 2013.

19 Now, Skky apparently -- I'm just going to move to
20 the next slide here -- Skky apparently rents an office from
21 the Parker Rosen law firm, but tellingly, there's no listing
22 of Skky on the 888 Colwell Building marquee. It only shows
23 Parker Rosen, again, at that 888 location.

24 And defendants actually last week discovered that
25 the Skky -- that Skky and the firm even share the same phone

1 number. What is unclear is what else do they share. Do
2 they share the same network, the same computer system, same
3 e-mail system, printers, copiers, mail delivery, filing
4 cabinet, support staff? We don't know any of this. We just
5 know that they operate out of the same shared suite and that
6 they now apparently share the same phone number. Here we
7 have obvious concerns because our confidential and highly
8 confidential information will be sent to this shared suite
9 throughout the litigation.

10 Now, the next slide I would like to share with the
11 Court, and again -- the next slide I would like to share
12 with the Court is a timeline. What this timeline shows is
13 from July of 2013 to last month what was happening at Skky,
14 Inc., on the top and what was happening in this litigation
15 on the bottom. And I'm not going to go into every single
16 box here because there are a lot of entries, but what I
17 would like to do is highlight a couple of the most important
18 items for the Court.

19 Here we have on July 1st of 2013 Andrew Parker
20 becomes the COO of Skky. Tellingly, that same month Skky
21 brings its first patent infringement cases as a
22 nonpracticing entity. Those cases are these present cases
23 before Your Honor.

24 The second thing I would like to highlight here is
25 the fact that while the parties were negotiating the

1 protective order in this case, which began in mid to late
2 October and ending right on the eve of the Rule 26(f)
3 conference, at that same time we had a number of meet and
4 confers, correspondence back and forth. It was a hotly
5 negotiated protective order. But at that same time Skky
6 moved into the Parker Rosen law firm at some date between
7 November and December.

8 At no time during the negotiations did we find out
9 about Mr. Parker's role as COO or did we find out that Skky
10 had moved into its outside counsel's law firm. We didn't
11 find this out despite the fact that those facts were highly
12 relevant to the negotiations.

13 Now, Skky should have disclosed these material
14 facts for two reasons. One, again, they were highly
15 relevant to the negotiations of the protective order and
16 these facts eviscerated key safeguards to defendants'
17 confidentiality in that order. We believed that the order
18 was being negotiated in good faith and would have liked to
19 have had this information brought to our attention.

20 The second reason and perhaps more compelling is
21 that on November 7, 2013 Manwin actually served discovery
22 requests on Skky and I will highlight Request No. 6 and
23 Request No. 7. Request No. 6 calls for corporate
24 organizational charts. Certainly if these documents were
25 produced we would have learned about Mr. Parker's role as

1 COO. And Request No. 7 called for various governmental
2 filings.

3 Again, remember the date here. That was
4 November 7, 2013. Thirty days later we received responses
5 to these requests and we received no information regarding
6 the material facts. We still haven't received any
7 information about the relevant facts.

8 THE COURT: You mean relevant facts, material
9 facts as to this motion that you've been --

10 MR. NOSHER: That's right. The four material
11 facts that I began the presentation with, we did not receive
12 any of that information. And, again, it's information that
13 first came out as a result of our research and has come out
14 in piecemeal fashion since our initial find.

15 And, Your Honor, our last slide, again, is just
16 the relevant Minnesota Rules of Professional Conduct and
17 here I would just draw the Court's attention to the fact
18 that Rule 1.8(k) imputes 1.8(i) onto an entire firm.

19 The only other issue that we have here, we have
20 moved for alternate relief in the form of a modified
21 protective order. We would be happy to consider going back
22 and revisiting the protective order, but frankly, we would
23 need all the relevant facts, unlike last time. We
24 definitely need more facts to be able to decipher what we
25 need to do to the current protective order.

1 I will say that Skky's current proposal is not
2 appropriate and it really turns the initial proposed --
3 initial protective order on its head.

4 And with that, I will close, Your Honor.

5 THE COURT: Why don't you close now and then we'll
6 have them and then I may have some questions depending on --

7 MR. NOSHER: Sure.

8 THE COURT: -- how this pans out with the
9 response.

10 Ms. Thorson on behalf of Skky.

11 MS. THORSON: Thank you, Your Honor. May it
12 please the Court, Becky Thorson representing Skky, Inc.

13 Defendants have taken a hypothetical issue
14 regarding access to documents and documents that they have
15 not yet produced and turned it into some scandalous attorney
16 misconduct issue.

17 Andrew Parker, who is seated here at counsel
18 table, is a long-standing member of this court's bar. He
19 has not violated the Minnesota Rules of Professional
20 Responsibility.

21 With no violation of the rules, there's no basis
22 to disqualify Mr. Parker, Mr. Rosen, or the Parker Rosen law
23 firm. At most this is a dispute about whether the
24 protective order should be modified to create additional
25 limitations or protections.

1 At the outset I want to address a couple of
2 background issues and factual issues that are presented in
3 the materials because this motion goes to Mr. Parker's
4 credibility and his appearance as a lawyer in this
5 community.

6 Skky did not agree to remove Mr. Parker as outside
7 counsel in this case because it believed Mr. Parker had done
8 anything wrong.

9 They try to paint Skky as this evil nonpracticing
10 entity, you know, no address up on the marquee, Mr. Parker
11 has a COO title, but there's nothing sinister about the
12 relationship that Mr. Parker has and it certainly doesn't
13 create any violation of the Rules of Professional
14 Responsibility.

15 It's also important for me to remind the Court
16 that there's been no allegation and no violation of the
17 protective order here. In fact, there couldn't be because
18 Skky has not received one document in response to its
19 discovery requests that were issued at the end of October.
20 So we don't have public documents, we don't have any
21 confidential documents or highly confidential documents in
22 response to our discovery requests.

23 We have offered during the pendency of this motion
24 for defendants to send their responsive discovery to the
25 Robins, Kaplan, Miller & Ciresi law firm. Even though we

1 don't think that the Parker Rosen law firm should be
2 excluded from being able to look at documents, and I'll get
3 into that a little bit later, we have offered to work with
4 the defendants to say, all right, let's not stall discovery,
5 let's move it along. And they have refused to do that.

6 So rather than figure out a way to work together,
7 the defendants have instead pushed the nuclear bomb button
8 and argued that there's some misconduct -- attorney
9 misconduct going on here. And in the words of Judge
10 Rosenbaum in the FDIC vs. Amundson case, what they're doing
11 is attempting to slay a colleague because there's some
12 dispute over access to documents.

13 As their sword they're invoking 1.8(i) and it's
14 telling that there was no discussion about how 1.8(i) would
15 even apply in their situation -- I apologize for the
16 microphone.

17 THE COURT: I do that all the time.

18 MS. THORSON: -- how 1.8 even applies here, 1.8(i)
19 even applies.

20 "A lawyer shall not acquire a proprietary interest
21 in the cause of action or subject matter of litigation the
22 lawyer is conducting for a client." This rule of
23 professional responsibility which defendants say Mr. Parker
24 violated is a rule that is designed to protect the client.
25 It's designed to protect situations where an attorney may

1 have an interest so great in the cause of action that the
2 attorney cannot exercise good judgment on behalf of the
3 client. That's the rule.

4 And it's questionable whether defendants, as third
5 parties, even have standing to invoke this rule. Of course
6 we totally accept that the Court has inherent authority to
7 monitor the activities of lawyers and to make sure that they
8 are conducting themselves consistent with the rules, but
9 whether defendants have standing to assert this rule when
10 it's a rule between a client and the client's attorney.

11 So let's look at the rule. Does Mr. Parker have a
12 proprietary interest in the cause of action or the subject
13 matter of the action? His role as COO is not a proprietary
14 interest in the cause of action.

15 His very small share of stock -- and the company
16 makes this even more far removed. Mr. Parker and Mr. Rosen
17 have equal interest in a company that shares 2.5 percent
18 stock with Skky. His very small share or his share of stock
19 is not a proprietary interest in the litigation.

20 There are two cases, Your Honor, that we've cited
21 in our brief and we gave to the defendants before they even
22 filed this motion. It's the Syscon Corp. vs. United States
23 case and the Eon Streams, Inc. vs. Clear Channel
24 Communication case.

25 In Syscon the lawyer was a founder of Syscon and

1 general counsel and a member of its board of directors. He
2 owned a portion of Syscon's stock. The lawyer's stock
3 ownership did not constitute proprietary interest in the
4 litigation.

5 In the Eon Streams case there was an attempt to
6 disqualify a law firm because members of the law firm had an
7 interest, stock ownership interest, in the client and that
8 stock ownership interest was about 3.11 to 3.5. That stock
9 ownership interest was not an interest in the litigation.

10 Those two cases support Skky's position that
11 there's no violation of 1.8(i).

12 So even if there wasn't a case out there that says
13 no proprietary interest when there's a stock ownership
14 interest, let's step back and look back at the rule.

15 And, again, the question in the 1.8 analysis is:
16 Was the interest that the lawyer had clearly likely to cause
17 an adverse effect on the lawyer's ability to exercise free
18 judgment on the client's behalf? Will the interest make it
19 difficult for the client to discharge or fire the attorney
20 without jeopardizing his or her case?

21 In answering this question, looking at the
22 material facts, the answer is no. Mr. Parker's relationship
23 with Skky does not pull him away from the interests of Skky.
24 If anything, Mr. Parker's interests are aligned with Skky.

25 Skky has the right to be represented by its

1 counsel of choice. Skky chose Andrew Parker and the Parker
2 Rosen law firm along with the Robins Kaplan law firm.

3 An attorney should be disqualified only if there's
4 a reasonable possibility that some specifically identifiable
5 impropriety actually occurred and, in light of the interests
6 underlying the standard of ethics, the social need for
7 ethical practice outweighs the party's right to choose
8 counsel of its choice. And that quote comes, Your Honor,
9 from the Carlsen v. Thomas case that's cited in our
10 materials.

11 As I mentioned, defendants probably don't even
12 have standing to raise 1.8(i). This is a rule that governs
13 the relationship between an attorney, Mr. Parker, and his
14 client, Skky.

15 There's no attorney misconduct. If this Court
16 looks at this issue through its inherent authority, there's
17 no misconduct. There's no showing of misconduct. The
18 burden is high and there's strict scrutiny. They have not
19 come close to meeting the burden and Mr. Parker should not
20 have to have this hanging over his head. He has not
21 committed attorney misconduct.

22 So the protective order seems to be the issue
23 here. The protective order was raised for the first time in
24 the motion, so there was no meet and confer once they say
25 these material facts arose. And we've offered compromises

1 in looking at how the protective order could maybe be
2 modified to address concerns.

3 But before we get into that, let's look at the
4 protective order. The protective order requires attorneys
5 who are bound by it to follow it. The idea that Mr. Parker,
6 Mr. Rosen, and the Parker Rosen law firm couldn't do that is
7 groundless and it's insulting. All of us, all the attorneys
8 who have to follow a protective order, have to filter what
9 information we can take in and who we can relay that to.

10 Mr. Parker signed off on that protective order and
11 he knew that if he received confidential information, that
12 he had to handle it appropriately. There is no basis to
13 suggest that he would do otherwise.

14 The protective order protects the defendants.
15 Mr. Parker, Mr. Rosen, and the Parker Rosen law firm can't
16 use that information. They have to have a filter. They
17 can't use that information for anything other than the
18 litigation.

19 There's a prosecution bar that prohibits anyone
20 from receiving highly confidential information from
21 participating in the prosecution of the patents. Who can
22 receive that highly confidential information? It's not just
23 the outside counsel.

24 So if you look at, and this is actually, Your
25 Honor, on the Court's docket at document number 32, the

1 protective order, Section 8, the court of course looks at --
2 can receive these documents, attorneys and their associates,
3 court reporters, outside experts, but importantly, in this
4 protective order defendants can have two in-house counsel
5 receiving documents. So they can designate two people
6 in-house to receive our confidential documents.

7 We've never questioned that they wouldn't receive
8 those documents inside the walls of the defendant. We've
9 never assumed that they're going to be evil. We've assumed
10 that they would handle the documents as attorneys bound by
11 the protective order. The same courtesy, the same
12 assumption should be given to Mr. Parker, Mr. Rosen, and the
13 Parker Rosen law firm.

14 So we think that the protective order covers any
15 concerns. We absolutely think this Court should rule and
16 rule quickly that Mr. Parker did not engage in attorney
17 misconduct.

18 We're willing to work with the defendants on a
19 protective order, but that should not preclude the Parker
20 Rosen law firm from having access to highly confidential
21 information and confidential information.

22 The idea that Parker Rosen is opening its office
23 doors to let anyone wander around, that they don't know how
24 to segregate documents, that a small firm is different from
25 a big firm, this Court should reject that notion and accept

1 that an officer of this court, Mr. Parker, will handle
2 himself appropriately.

3 Your Honor, we ask you to deny the motion to
4 disqualify Mr. Parker and the Parker Rosen law firm. Thank
5 you.

6 THE COURT: Okay. Thank you.

7 Reply or brief response.

8 MR. NOSHER: Thank you, Your Honor. Just a few
9 rebuttal points.

10 I think I'll start with the protective order
11 issue. Our concern is not only with Mr. Parker, but the
12 individuals at Skky who are apparently working out of the
13 Parker Rosen firm. We don't know who's working there. We
14 don't know what their role is. We don't know if there are
15 shared systems, e-mail system, printers, copiers. All we
16 know is that our confidential information is going to go to
17 this shared suite. Beyond that we don't know.

18 Going back to a point that counsel mentioned, I do
19 want to clarify the record that no public documents were
20 produced by the defendants. Defendants have actually
21 produced over 7,000 pages of documents to date. That is
22 double what Skky has produced. It's only by chance and luck
23 that defendants discovered this information before any AEO
24 materials were disclosed because, frankly, if they were
25 disclosed we would be in a whole another mess right now.

1 As to the stipulation, counsel for Skky did offer
2 verbally to screen the Parker Rosen firm. We asked Skky to
3 enter into a stipulation that mirrored that verbal offer.
4 They refused to sign that stipulation. Instead they
5 returned a four-page stipulation that included a lot of pork
6 relating to discovery disputes that we did not think was
7 relevant as to our proposed stipulation. Again, our
8 proposed stipulation stands. If counsel would like to sign
9 that, it is a mirror image of their offer to screen Parker
10 Rosen.

11 The final point is --

12 THE COURT: Explain that one more -- explain that
13 in more detail, what you're talking about there.

14 MR. NOSHER: I'm sorry?

15 THE COURT: Please explain in more detail what
16 you're talking about as far as your stipulation and what
17 happened there.

18 MR. NOSHER: Okay. Sure. In an effort to move
19 discovery along in these cases, the parties discussed what
20 we could do short of going to court in order to keep
21 defendants' confidentiality intact. Skky offered verbally
22 to screen the Parker Rosen firm until Your Honor ruled on
23 defendants' motion. We thought --

24 THE COURT: Tell me what that -- tell me what
25 you're saying there, "screen the Parker Rosen firm."

1 MR. NOSHER: To screen --

2 THE COURT: What did they say?

3 MR. NOSHER: Frankly to keep Mr. Parker,
4 Mr. Rosen, and the firm from viewing any confidential and
5 highly confidential information as the Court rules on our
6 motion.

7 THE COURT: Okay.

8 MR. NOSHER: That was our interpretation of what
9 screening of the firm would be.

10 THE COURT: Okay.

11 MR. NOSHER: And of course that would change
12 subject to what Your Honor --

13 THE COURT: Sure.

14 MR. NOSHER: -- rules on the motion.

15 THE COURT: Okay.

16 MR. NOSHER: We, frankly, thought that was a good
17 idea so that we could move along with discovery and offered
18 a stipulation that essentially mirrored that offer. It was
19 a one-page stipulation that said that Parker Rosen would be
20 screened going forward until Your Honor ruled. Again, Skky
21 refused to sign that stipulation and instead responded with
22 a four-page stipulation adding on all sorts of pork with
23 discovery disputes that we did not think were relevant.

24 THE COURT: All right. Now I follow you.

25 MR. NOSHER: And then as to counsel's final point

1 on whether the parties raised in the meet and confer this
2 issue of the protective order, we've raised this issue with
3 the protective order a number of times during the meet and
4 confer conversations with opposing counsel. And I just
5 wanted to clarify that for the record.

6 THE COURT: You mean as far as this motion?

7 MR. NOSHER: That's right.

8 THE COURT: The meet and confer --

9 MR. NOSHER: Our moving papers are certainly not
10 the first time that counsel heard about our concerns with
11 the protective order.

12 THE COURT: Okay.

13 MR. HEVERIN: Your Honor, may I --

14 THE COURT: On behalf of?

15 MR. HEVERIN: On behalf of Dada and Thumbplay.
16 Tim Heverin on behalf of Dada and Thumbplay. I just wanted
17 to respond to a couple of points that were made by the
18 plaintiffs.

19 The plaintiffs mentioned that Mr. Parker signed
20 off on the protective order that excluded company executives
21 from seeing confidential information and that as a lawyer he
22 knows how to execute that. I think it is important to point
23 out that when he signed off on that he was an executive at
24 Skky undisclosed but to us and only found out later.

25 The plaintiff also made the point that the

1 protective order -- and I really think this is a
2 confidentiality issue. We're not -- plaintiff used words
3 like "evil," "sinister," "scandalous," that we're trying to
4 slay a colleague, that we have gone nuclear, that there's
5 attorney misconduct. Those aren't our words. We're trying
6 to resolve this issue, which is, we think, a violation of
7 1.8, but also and predominantly a confidentiality concern.

8 When plaintiff's counsel described the protective
9 order as providing for two in-house counsel to see
10 confidential information, that's true. Those in-house
11 counsel are not executives that run the day-to-day business
12 of the company. And also that was negotiated and fully
13 disclosed at the time of negotiations.

14 If plaintiff would have told us that Mr. Parker
15 was an executive of Skky, then we would have treated him
16 like an executive of Skky and excluded him from the
17 protective order.

18 So to the extent that the plaintiffs are painting
19 this as an issue that could have been negotiated in the
20 protective order originally, that might be true. The
21 problem is that we did not know that Mr. Parker and his firm
22 had a proprietary interest in Skky, it wasn't disclosed to
23 us, and we negotiated the protective order without full
24 disclosure on that issue.

25 THE COURT: Okay.

1 MR. HEVERIN: I think that's it, Your Honor.

2 Thank you.

3 THE COURT: No one else is going to argue? Then
4 you get a response to that since there was a second argument
5 or you get, I guess, the final -- the final-final.

6 MS. THORSON: Thank you, Your Honor. Your Honor
7 had questions about the stipulation because we wanted to at
8 least move discovery along.

9 Defendants asked us to sign a stipulation where we
10 would temporarily receive documents only at the Robins,
11 Kaplan, Miller & Ciresi law firm and Parker Rosen would not
12 have access to those documents.

13 We were willing to sign a stipulation if we knew
14 they were about ready to produce documents. And where this
15 fell apart was when we said we will file a stipulation with
16 the court when you tell us you'll produce the documents the
17 next day. So you can have what you want, but we didn't want
18 to have a stipulation on file without the benefit of
19 receiving any discovery.

20 Our requests for discovery have been outstanding
21 since October. The documents that they produced, none of
22 them were in response to our discovery requests. The
23 documents they produced were public prior art documents that
24 they intended to use.

25 So we have not received any discovery from the

1 defendants and when we said we'll sign a stipulation but you
2 need to produce discovery, we were told no.

3 THE COURT: Okay.

4 MS. THORSON: Thank you, Your Honor.

5 THE COURT: Very good. I am going to take this
6 under advisement and I'll issue an order as soon as I can.
7 I think that's it. We'll be in recess. Thank you.

8 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

9 (Court adjourned.)

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15 I, Lori A. Simpson, certify that the foregoing is a
16 correct transcript to the best of my ability from the
17 digital recording in the above-entitled matter.

18
19 Certified by: s/ Lori A. Simpson

20 Lori A. Simpson, RMR-CRR
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